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No. 96-1783

In the Supreme Court of the United States

OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,
Petitioner

v.

OFFICE OF INDEPENDENT COUNSEL, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Section 535(b) of Title 28 requires that a federal government agency expeditiously provide to federal law enforcement authorities "[a]ny information" relating to federal criminal violations. The question presented is whether, in light of Section 535(b), a federal government agency may withhold relevant information subpoenaed by a federal grand jury.

2. If Section 535(b) does not apply, a second question presented is whether, under Federal Rule of Evidence 501, a federal government agency may rely on a governmental attorney-client or work product privilege to withhold relevant information subpoenaed by a federal grand jury.

3. If a federal government agency can maintain governmental attorney-client and work product protections in federal grand jury proceedings, a third question presented is whether petitioner has satisfied the requirements of those protections.

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States, represented in this criminal investigation by the Independent Counsel In re: Madison Guaranty Savings & Loan Association, see 28 U.S.C. 594(a); the White House Office, which has referred to itself "[f]or convenience" as the "Office of the President" since its September 30, 1996, brief in the district court; and Hillary Rodham Clinton, who was an intervenor in the court of appeals and who has filed a response in support of the petition for a writ of certiorari.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is not yet reported. The opinion of the district court (Pet. App. 62a-83a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1997. The petition for a writ of certiorari was filed on May 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 5, 1994, pursuant to the application of Attorney General Reno under 28 U.S.C. 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels, appointed Kenneth W. Starr as Independent Counsel to represent the United States in investigating and prosecuting matters "relating in any way to

James B. McDougal's, President William Jefferson Clinton's, or Mrs. Hillary Rodham Clinton's relationships with Madison Guaranty Savings and Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." *In re Madison Guaranty Savings & Loan Association*, at 2 (D.C. Cir. Spec. Div. Aug. 5, 1994).

Madison Guaranty was a federally insured savings and loan in Little Rock, Arkansas, operated by James B. McDougal and Susan H. McDougal. Hillary Rodham Clinton performed work for Madison in her capacity as an attorney at the Rose Law Firm in Little Rock. Capital Management Services was a federally licensed small business investment company in Little Rock operated by David L. Hale, a Little Rock judge and businessman. Whitewater Development Company was a real estate venture owned by the McDougals and the Clintons. David Hale, James McDougal, Susan McDougal, and nine other individuals have been convicted of federal crimes during this investigation.[1]

This Office has investigated events occurring in the aftermath of the July 20, 1993, death of former Deputy White House Counsel Vincent W. Foster, Jr., including the handling of documents from his White House office. Bates Decl. ¶ 2(App. 16).[2] On July 22, 1993, Whitewater-related documents (along with others) were transferred from Mr. Foster's office in the White House's West Wing to a room on the third floor of the White House Residence.

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[1] On March 22, 1994, Hale pled guilty to a two-count felony information. On May 28, 1996, the McDougals were convicted by jury verdict, along with the then-Governor of Arkansas Jim Guy Tucker. The jury found James McDougal guilty of 18 felony counts including conspiracy, bank fraud, misapplication, false entry, and mail fraud. The jury found Susan McDougal guilty of four felony counts including mail fraud, misapplication, false entry, and false statements. The jury found Tucker guilty of one count of conspiracy and one count of mail fraud.

[2] The citations to "App." refer to Appellant's Appendix in the court of appeals.

On July 27, 1993, documents that had been in Mr. Foster's office and stored on the third floor of the Residence were taken from the Residence to the Clintons' personal lawyers.

This Office also has investigated the circumstances surrounding the discovery of certain copies of Rose Law Firm billing records that reflect Mrs. Clinton's legal work for Madison (and contain handwritten notes of Mr. Foster). Bates Decl. ¶ 2 (App. 16). The records, which were responsive to a May 1994 grand jury subpoena to Mrs. Clinton, were produced to this Office by Mrs. Clinton's personal attorney in January 1996. White House aide Carolyn Huber publicly testified that she found the copies (the originals have never been produced) on the third floor of the White House Residence in August 1995; placed them in a box without realizing exactly what they were; and then discovered the records in her East Wing office in January 1996.

2. This Office has sought numerous documents by grand jury subpoena from the Executive Office of the President and its constituent parts, including the White House Office. This Office informed the White House in March 1995—*before either of the two sets of notes at issue here were created*—that we did not accept the proposition that governmental attorney-client or work product privileges authorized the White House to withhold relevant information from the grand jury. Bates Decl. ¶ 10 (App. 17-18).

Among the documents sought during the course of the criminal investigation have been notes taken by White House officials (including White House attorneys) during meetings or interviews with personnel who were participants in or witnesses to events under criminal investigation. *The White House has produced White House attorneys' notes of their meetings with numerous White House officials.* For example, the White House produced notes taken by White House attorneys during meetings with former White House Counsel Bernard Nussbaum

and Assistant to the President Margaret Williams regarding the handling of documents from Mr. Foster's office in the wake of his death. Bates Decl. ¶ 12 (App. 18). In addition, as is publicly known, White House attorneys have testified before the grand jury about their work.

3. The grand jury subpoena here was issued after this Office learned of certain meetings in 1995 and 1996 between Mrs. Clinton and White House attorneys. It required production of documents reflecting those meetings to the extent they related to subjects including Madison, Whitewater, James B. McDougal, David L. Hale, or Vincent W. Foster, Jr. App. 3. The White House identified nine sets of responsive documents but refused production, interposing claims of Executive privilege, attorney-client privilege, and work product. App. 7-12.

4. On August 19, 1996, this Office filed a motion to compel production of two sets of documents: (1) notes taken by Associate White House Counsel Miriam Nemetz on July 11, 1995, at a meeting with Mrs. Clinton, Special White House Counsel Jane Sherburne, and Mrs. Clinton's personal attorney David Kendall; and (2) notes taken by Ms. Sherburne at meetings with Mrs. Clinton on January 26, 1996, which were also attended by Mr. Kendall and his partner Nicole Seligman, and in part by Jack Quinn, then the White House Counsel. App. 13; Sherburne Decl. ¶¶ 16, 20 (Pet. App. 89a, 90a). The July 11, 1995, notes relate to Mrs. Clinton's activities in the aftermath of Mr. Foster's death. Sherburne Decl. ¶ 16 (Pet. App. 89a). The January 26, 1996, notes relate to Mrs. Clinton's testimony about the Rose Law Firm billing records reflecting Mrs. Clinton's work for Madison. Sherburne Decl. ¶¶ 18-20 (Pet. App. 89a-90a).[3]

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[3] Mrs. Clinton was questioned by this Office at the White House on July 22, 1995. She was questioned before the grand jury on January 26, 1996. In the district court, this Office set forth why the subpoenaed notes were relevant, and offered to make a further submission in camera.

The parties disputed whether a federal government agency can maintain *governmental* attorney-client and work product protections to withhold relevant information in federal grand jury proceedings.[4] The district court issued its decision on November 26, 1996. Although noting that "[t]he issues in this case have been complicated somewhat by the manner in which the White House Counsel's office has defined its area of responsibility," Pet. App. 75a n.7, the court did not address the fundamental privilege issue. Relying instead on a narrow, factbound argument advanced by Mrs. Clinton, the district court accepted the privilege claim, basing its conclusion on "the reasonable belief of the White House and Mrs. Clinton that the communications were privileged and by the fact that the notes are attorney work product." *Id.* at 82a.

5. The court of appeals reversed. Pet. App. 1a-61a. The court began with Federal Rule of Evidence 501, which states that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience." *Id.* at 5a. Privileges "are not lightly created nor expansively construed" under Rule 501, for they "are in derogation of the search for truth." *Id.* at 12a (quoting *United States* v. *Nixon,* 418 U.S. 683, 710 (1974)).

Turning to the question presented, the court observed that the decision in "*Nixon* is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." Pet. App. 15a. The court rejected the White House's argument that, notwithstanding *Nixon,* a government agency is entitled to the same evidentiary privileges as a private corporation. The court noted several important differences betwen the government and private organizations, including that the

[4] Without explanation, the White House withdrew its claim of Executive privilege on September 30, 1996.

actions of White House personnel "cannot expose the White House as an entity to criminal liability," and that "executive branch employees, including attorneys, are under a statutory duty to report" information relating to criminal violations. *Id.* at 17a (citing 28 U.S.C. 535(b)).

The court also found that the "general duty of public service calls upon government employees and agencies to favor disclosure over concealment." Pet. App. 17a. The court of appeals noted, in this regard, that the Supreme Court had rejected a proposed privilege for accountants because of their "*public* responsibility" and "public obligations." *Id.* at 17a-18a (quoting *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984)). The court of appeals explained that "[t]he public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications." Pet. App. 18a. The court added:

> [T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.

Ibid.

The court similarly concluded that a governmental work product protection, like the governmental attorney-client privilege, could not shield the notes from the grand jury. Pet. App. 25a-27a. Finally, the court rejected the district court's analysis, stating that "we know of no authority, and Mrs. Clinton has cited none, holding that a client's beliefs, subjective or objective, about the law of privilege can transform an otherwise unprivileged conversation into a privileged one." *Id.* at 24a.

District Judge Kopf, sitting by designation, dissented. He agreed that the White House's argument for an absolute attorney-client privilege was inconsistent with this Court's decision in *Nixon*, which "teaches that the President's general need for confidentiality (expressed here by the attorney-client privilege) is outweighed by a grand jury's need for evidence of the truth." Pet. App. 51a. He concluded that "it is a reasonable extension of *Nixon* to pierce the organizational attorney-client privilege asserted by the White House," *id.* at 57a, and "[t]he same analysis justifies piercing the work product 'privilege,'" *id.* at 51a n.4. Under the particular facts, however, Judge Kopf would have applied the decision prospectively only, and thus would have affirmed the judgment of the district court. *Id.* at 60a-61a.

ARGUMENT

The legal issue before the Court is one of first impression in the federal courts. Not only is there no circuit conflict, but only three federal judges—the court of appeals panel in this case—have addressed the question.[5] Significantly, all three judges rejected petitioner's argument for blanket governmental attorney-client and work product privileges in federal criminal proceedings.

The issue is exceedingly narrow. The case presents only the application, in this particular grand jury setting, of Federal Rule of Evidence 501 and 28 U.S.C. 535(b).[6] The petition raises no constitutional question. Nor does the case concern the availability or scope of governmental privileges in civil or congressional proceedings, or under the Freedom of Information Act.

What the case presents, at bottom, is a bold assertion of a *governmental* privilege against a federal grand jury's interest in securing relevant evidence. The decision of

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[5] The district court did not address this issue.

[6] Federal Rule of Evidence 501 and 28 U.S.C. 535(b) are set out in an appendix to this brief.

the court of appeals rejecting that assertion is thoroughly and soundly grounded in law and public policy. To grant plenary review when the case law is so sparse (and the decision of the court of appeals so well-reasoned) not only would represent a departure from the Court's customary practice, it would occasion further delay in sensitive grand jury proceedings in which the national interest would be served by the uninterrupted completion of the criminal justice process.

For those reasons, the petition should be denied.

I

1. At the outset, we note the obvious: This Court's review would delay a highly sensitive criminal investigation; indeed, several parts of the investigation could remain frozen for an additional three to twelve months. "[D]elay is fatal to the vindication of the criminal law." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). That is especially true in the investigative stage. Because "extended litigation" impedes the "orderly progress of an investigation," *United States* v. *Calandra*, 414 U.S. 338, 349 (1974), and "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws," *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991), federal courts attempt to avoid the "protracted interruption of grand jury proceedings," *Calandra*, 414 U.S. at 349-350.

2. In any event, the dictates of this Court's Rule 10 counsel strongly against review at this time. Not only is there no circuit conflict, but in only one reported case before this dispute, so far as the parties are aware, has the issue even arisen.[7] The novelty of the issue in the

[7] The issue in that case involved a state agency; the court of appeals did not analyze the privilege issue, but instead remanded for consideration of the application of state sunshine laws. See *In re Grand Jury Subpoena*, 886 F.2d 135 (6th Cir. 1989). One intermediate state court decision addressed a similar issue under *state* law, but the case involved a private law firm retained by a

courts counsels hesitation before this Court exercises its discretionary certiorari jurisdiction. See *Lackey* v. *Texas*, 115 S. Ct. 1421, 1421-1422 (1995) (Stevens, J., respecting denial of certiorari) ("importance and novelty" of a question with "potential for far-reaching consequences" provide "principled basis for postponing consideration of the issue until after it has been addressed by other courts").

3. Not only is the issue novel in the courts, it is extraordinarily narrow. The question here concerns *governmental* attorney-client and work product protections in federal *criminal* proceedings. See Fed. R. Evid. 501, 1101(c), (d). The issues *not* presented include the following:

First, the case raises no issue regarding the application of government attorney privileges in *civil* proceedings. See Pet. App. 5a.[8] The court of appeals' decision is entirely consistent with recognition of governmental attorney-client and work product privileges in federal civil proceedings,[9] where the government is opposed to a private party and where evidentiary privileges generally carry more weight. Cf. *United States* v. *Nixon*, 418 U.S. 683, 712 n.19 (1974).

Second, because Rule 501 does not apply to congressional proceedings, the case implicates no question re-

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state agency, not government attorneys who were public employees, a distinction of importance under state law. See *In re Grand Jury Subpoenas Duces Tecum*, 574 A.2d 449, 455 (N.J. Super. Ct. App. Div. 1989). See also Pet. App. 8a-10a.

[8] Nor is any issue presented regarding the scope of a criminal defendant's discovery from the Government. Such discovery is governed by settled principles under Fed. R. Crim. P. 16, Fed. R. Crim. P. 26.2, 18 U.S.C. 3500, *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972).

[9] That includes proceedings under the Freedom of Information Act (FOIA), in which government agencies can withhold documents based on the civil litigation privileges ordinarily available to private parties. 5 U.S.C. 552(b)(5).

garding the scope of the privileges that a government agency (or an individual) can maintain in congressional proceedings.[10]

Third, the case presents no question as to the scope of the privileges that an individual or private corporation can maintain in any proceedings, civil or criminal.

Fourth, no constitutional issue is presented. Indeed, because the question involves the application of a federal statute and a federal rule of evidence, Congress can further study the issue and address it legislatively at any time.

Fifth, petitioner has not challenged the jurisdiction or authority of this Office to represent the United States in conducting this criminal investigation. See 28 U.S.C. 594(a), 596(a)(1). Nor has petitioner asked the Court to reconsider *Morrison* v. *Olson*, 487 U.S. 654 (1988), or raised any issue of separation of powers.

Finally, petitioner has not raised the question whether Mrs. Clinton's asserted expectation about the law was sufficient to render the communications privileged, which was the basis for the district court's decision. Petitioner also has not raised the question of possible prospective-only application, which in the end was the main issue on which the dissenting judge disagreed with the panel majority in the court of appeals. Hence, those two issues are not before this Court. See Sup. Ct. R. 14.

4. Petitioner indicates that it seeks review because an important principle is at stake, not because of these notes. See Pet. 9-10. The undisputed record belies such a claim. The White House has produced reams of attorney notes virtually identical to those at issue here, *including attorney notes addressing the same subject matters.* Bates Decl.

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[10] Congress recognizes privileges as required by the Constitution or pursuant to its own rules and practices under its Article I authority. See S. Rep. No. 104-191, at 11-12 (1995).

¶ 12 (App. 18).[11] The only difference here is that these notes reflect communications with Mrs. Clinton. Petitioner has explained that distinction by saying simply that White House attorneys' documents have been disclosed when that "could be accomplished without compromising important governmental interests." Sherburne Supp. Decl. ¶ 3 (App. 31). The explanation is untenable: No principle, no governmental interest, justifies releasing attorneys' notes of communications with government officials such as Bernard Nussbaum and Margaret Williams *and* simultaneously withholding attorneys' notes of communications with Mrs. Clinton—given that all of the notes concern the same subject matter.

II

The decision of the court of appeals is correct. It is dictated by four separate sources of law: Section 535(b) of Title 28, traditional considerations under Federal Rule of Evidence 501, this Court's precedent (particularly *United States* v. *Nixon*), and compelling public policies.

1. Federal Rule of Evidence 501 provides that privileges in federal proceedings are "governed by the principles of the common law as they may be interpreted * * * in the light of reason and experience" except, *inter alia*, as "provided by Act of Congress." Here, Section 535(b) of Title 28 imposes a specific disclosure obligation on Executive Branch employees that requires rejection of petitioner's common-law privilege claim. The statute provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency * * *.

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[11] The technical question whether petitioner waived the privilege as to these notes was complicated, however, because attorneys for two clients were present for the communications. See *John Morrell & Co.* v. *Local Union 304A*, 913 F.2d 544, 556 (8th Cir. 1990).

28 U.S.C. 535(b) (originally enacted as Act of Aug. 31, 1954, ch. 1143, § 1, 68 Stat. 998, 998). Labeling the statute "significant," the court of appeals stated that "executive branch employees, *including attorneys*," have a duty to report information relating to criminal wrongdoing. Pet. App. 17a (emphasis added).[12]

a. The language of the statute is clear and all-encompassing. It admits of no distinction between information obtained by government attorneys and that obtained by other government employees. See *International Longshoreman's Ass'n* v. *Allied Int'l, Inc.*, 456 U.S. 212, 225 (1982) ("[i]n the absence of any limiting language in the statute or legislative history, we find no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision").

In addition, Congress' inclusion of a specific exception for "class[es] of information" as to which the Attorney General "directs otherwise," 28 U.S.C. 535(b)(2), confirms that the statute means what it says and says what it means—and that no further exceptions should be judicially inferred or created. See *United States* v. *Smith*, 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception"); *Honig* v. *Doe*, 484 U.S. 305, 325 (1988) (Court "not at liberty to engraft onto the statute an exception Congress chose not to create").[13]

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[12] The information sought by the grand jury "involv[es] Government officers and employees." 28 U.S.C. 535(b). The notes here are relevant to the grand jury's investigation of several present or former White House officers and employees.

[13] Similarly, in *University of Pensylvania* v. *EEOC*, 493 U.S. 182 (1990), Title VII provided for government access to information relevant to a discrimination charge. A university argued for a "privilege" exception for academic peer review materials. The Court rejected the claim, stating that the Title VII provisions "[o]n their face * * * do not carve out any special privilege relating to peer review materials." *Id.* at 191.

b. The legislative history confirms and strengthens that conclusion. The House Committee Report accompanying Section 535 states that "[t]he purpose" of the provision is to "require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning *any alleged irregularities* on the part of officers and employees of the Government." H.R. Rep. No. 83-2622 (1954) (emphasis added), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3551. The report emphasizes that "[i]f the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have *complete cooperation* from the department or agency concerned." *Id.* at 3552 (emphasis added). The Justice Department supported the legislation. Then-Deputy Attorney General Rogers expressed the Department's views as follows:

> The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the chief law-enforcement officer of the Government is to have *free access* to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office.

Id. at 3553 (emphasis added).[14]

c. This analysis is also consistent with traditional understandings. For example, Lloyd N. Cutler, who has served as White House Counsel in two Administrations, has remarked that there can be "problems relating to misconduct that you learn about somewhere in the White House or elsewhere in the Government." Cutler, *The Role of the Counsel to the President of the United States*, in The Record of the Association of the Bar of the City of New York, Vol. 35, No. 8, at 470, 472 (1980). Mr. Cutler noted that there is a "rule of making it your duty, *if you're a Government official as we as lawyers are, a*

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[14] "When issuing [grand jury] subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987); see 28 U.S.C. 594(a).

statutory duty to report to the Attorney General any evidence you run into of a possible violation of a criminal statute." *Ibid.* (emphasis added). Mr. Cutler further remarked that "[w]hen you hear of a charge and you talk to someone in the White House * * * about some allegation of misconduct, almost the first thing you have to say is, 'I really want to know about this, but anything you tell me I'll have to report to the Attorney General.'" *Ibid.*[15]

d. In addition, federal regulations require each agency to have a "designated ethics official," generally an attorney, to provide ethics counseling to employees. 5 C.F.R. 2635.107. The regulations state: "Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code." *Ibid.*

e. In attempting to avoid the import of Section 535(b) during this litigation, petitioner has advanced several arguments "reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini." *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 222 (1979) (Rehnquist, J., dissenting). Here, petitioner inters the statute in a footnote, noting (without any explanation) two arguments. See Pet. 22-23 n.7.[16]

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[15] Similarly, petitioner has previously acknowledged these disclosure obligations. The 1993 White House report on the Travel Office episode stated that "White House personnel may find that they have information about a *possible* violation of law. If there is a reasonable suspicion of a crime * * * about which White House personel *may have* knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General." White House Travel Office Management Review 23 (July 2, 1993) (emphases added).

[16] It is not disputed that the Executive Office of the President and the component White House Office are covered by Section 535. See

First, petitioner refers generally to the "legislative history" of Section 535. Pet. 22 n.7. As noted above, however, the legislative materials strongly support the text.

Second, petitioner cites several unpublished Office of Legal Counsel (OLC) memoranda. But those memoranda have no application here. Under authority delegated by the statute, the Attorney General has authorized an exception to Section 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. 50.15), represent employees in their *personal* capacities—for example, in civil suits alleging *Bivens* violations. The OLC memoranda cited by petitioner address only the exception for these *personal* representations.[17] The Justice Department regulation and the OLC memoranda do not (and do not purport to) apply to situations where a government attorney represents a *government agency* and learns information during the course of her *official* representation of that agency.[18]

Pet. 22-23 n.7; W.H. Br. 40-43 (filed in 8th Cir. Jan. 30, 1997); W.H. Supp. Br. 7-8 (filed in E.D. Ark. Nov. 6, 1996; under seal); U.S. Supp. Br. 9-12 (filed in E.D. Ark. Nov. 6, 1996; under seal).

[17] See OLC Mem. of Mar. 29, 1985, at 5 (analyzing duty under 50.15 and 535(b) of an Assistant U.S. Attorney who discovered information while representing *Bivens* defendants); OLC Mem. of Apr. 3, 1979, at 1 (addressing question regarding "propriety of providing Justice Department representation in a civil suit to a government employee"); OLC Mem. of Aug. 30, 1978, at 4 (analyzing under 50.15 and 535(b) the "contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken"); OLC Mem. of Nov. 30, 1976, at 1 (addressing question regarding situation where "[t]he U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages").

[18] Cf. 6 Op. Off. Legal Counsel 626, 627 (1982) (stating, in context of proposal for certain kinds of inspector general investigations, that "evidence of criminal conduct 'uncovered' during the course of an investigation, will be referred directly to the Department of Justice, *as is required by 28 U.S.C. § 535*"). OLC is well-versed in the crucial distinction between representation of the

The court of appeals correctly stated that the OLC memoranda deal with representations of individuals pursuant to 28 C.F.R. 50.15 and that "[n]o such personal attorney-client relationship exists between Mrs. Clinton and the White House attorneys." Pet. App. 19a n.10.[19]

In this case, in sum, the grand jury subpoena requires disclosure unless a valid privilege applies. Because petitioner's common-law privilege claim is contravened by Section 535(b), the notes must be produced.

2. Even if Section 535(b) were erased from the United States Code, petitioner's claim would fail under traditional Rule 501 privilege analysis. Federal courts are deeply committed to the principle that "the public has a right to every man's evidence," *Jaffee* v. *Redmond*, 116 S. Ct. 1923, 1928 (1996) (quotation omitted)—a principle "particularly applicable to grand jury proceedings," *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). Because testimonial privileges "obstruct the search for truth," there is a "presumption against the existence of an asserted testimonial privilege." *Id.* at 690 n.29, 686. Privileges thus "are not lightly created nor expansively construed." *Nixon*, 418 U.S. at 710.

In light of those settled principles, this Court has recognized common-law privileges, or applied them in a particular setting, only when the privilege (or application thereof) is historically rooted or recognized in the vast majority of the States—and is justified by overriding public policy considerations. See Pet. App. 12a-13a. Here, the roots are nonexistent; to the contrary, the parties have found no case, statute, rule, or agency opinion suggesting that a

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personal interests of a government employee and representation of the governmental interests of a government agency. See, *e.g.*, 4B Op. Off. Legal Counsel 749, 751 (1980) (distinguishing between representation of personal interests and governmental interests).

[19] White House attorneys did not represent Mrs. Clinton in her personal capacity. See Sherburne Decl. ¶¶4, 7-10, 17, 21 (Pet. App. 84a-90a); Kendall Aff. ¶¶ 2-3 (Pet. App. 92a-93a). Such representation is not authorized. See 3 U.S.C. 105(a)(1); 28 C.F.R. 50.15 (a)(4); 4B Op. Off. Legal Counsel 749, 753 (1980).

department or agency of the United States (or any state governmental entity) can maintain a governmental attorney-client or work product privilege in federal criminal or grand jury proceedings.[20] Nor are we aware of a contemporary *state* case, law, or rule adopting such privileges for public attorneys in the criminal context.

The practice of Executive Branch agencies further suggests that the application of the privilege is not rooted in historical practice or contemporary understandings. In the Iran-Contra investigation, for example, White House and other government lawyers provided extensive information about their conversations with the President and other government officials. See, *e.g.*, Final Report of the Independent Counsel for Iran/Contra Matters, Vol. I, at 44, 346-348, 366-368, 470 n.137, 474-479, 517, 520, 536 & nn.116 & 117 (Aug. 4, 1993). What is more, in this very investigation, the White House and other Executive Branch agencies have disclosed considerable information that, under petitioner's argument, is protected by attorney-client or work product privilege.

Consistent practice, coupled with the absence of any authority supporting petitioner, refutes the claim that a governmental attorney-client or work product privilege has traditionally been understood to justify withholding relevant information from the federal criminal process. Cf. *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 131 (1983) ("Government's failure for over 60 years to exercise the power it now claims * * * strongly suggests that

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[20] Petitioner cites a 1982 OLC opinion, see 6 Op. Off. Legal Counsel 481 (1982), but as the court of appeals indicated, that OLC opinion says nothing about the application of governmental common-law privileges in federal criminal procedings. See Pet. App. 18a n.10. Even for purposes of congressional inquiries, moreover, OLC has stated that "communications between the Attorney General, his staff, and other Executive Branch 'clients' that might otherwise fall within the common law attorney-client privilege should be analyzed in the same fashion as any other intra-Executive Branch communications." 10 Op. Off. Legal Counsel 68, 78 (1986).

it did not read the statute as granting such power"). The total absence of historical or contemporary support for petitioner's position demonstrates that the privilege claim in this context is a latter-day contrivance that warrants rejection. Cf. *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 195 (1990); *Branzburg*, 408 U.S. at 685-687.

3. In addition, as all three judges on the court of appeals panel concluded, petitioner's argument contravenes this Court's decision in *Nixon*. The decision in *Nixon* held that the Executive privilege for Presidential communications—a privilege that is constitutionally based, historically rooted, and "fundamental to the operation of Government," 418 U.S. at 708—was overcome by the need for relevant evidence in criminal proceedings. *Nixon* leads inexorably to the conclusion that a governmental attorney-client or work product assertion similarly must yield to the need for relevant evidence in criminal proceedings. See Pet. App. 15a; accord *id.* at 51a, 57a (Kopf, J., dissenting). It is untenable as a matter of federal common law to say that communications between a President and his closest advisors (subject to a deeply rooted constitutional and common-law privilege "fundamental to the operation of Government") are *less* worthy of protection in criminal proceedings than are communications between any government employee and government attorney (as to which there is neither historical nor contemporary support for the privilege application).

Petitioner suggests that the personal attorney-client privilege exists in criminal proceedings notwithstanding *Nixon*, so why not a governmental attorney-client privilege? Pet. 22. That argument would have force only if there were *no* differences between public and private entities for purposes of common-law privileges in criminal proceedings. But those differences do exist, and they are of profound relevance to a reasoned analysis of the issues presented. Indeed, this Court has firmly rejected the suggestion that the common law of privileges takes no account of the different responsibilities of public and private

entities. In declining to apply a privilege to an accountant's workpapers, the Court emphasized:

> The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. * * * [T]he independent auditor assumes a *public* responsibility transcending any employment relationship with the client. * * * This "public watchdog" function demands that the accountant maintain total independence from the client at all times *and requires complete fidelity to the public trust.* To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with *public* obligations.

United States v. *Arthur Young & Co.*, 465 U.S. 805, 817-818 (1984) (emphases added). Government attorneys, far more than accountants, owe a *public* duty that is inconsistent with application of governmental attorney-client and work product privileges in federal criminal proceedings.[21]

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[21] Respected commentators and the Restatement similarly reject petitioner's equation of private corporations to public entities in this context. See 1 *McCormick on Evidence* § 87.1, at 321 (4th ed. 1992) ("where the entity in question is governmental * * *, significantly different considerations appear"); 24 Wright & Miller, *Federal Practice and Procedure* § 5475, at 126-127 (1986) ("[T]he costs of the government privilege may be very high. * * * [L]egitimate claims for governmental secrecy should all be worked out in the context of the existing privileges for secrets of state and official information."); Restatement (Third) of the Law Governing Lawyers § 124 cmt. b. (Mar. 29, 1996) ("[U]nlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business."); *ibid.* ("More particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved.").

4. Even if petitioner's proposed privilege application were both (i) rooted in historical or contemporary law and (ii) consistent with this Court's precedent, petitioner still would have to demonstrate a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee*, 116 S. Ct. at 1931. The court of appeals correctly concluded that relevant policy considerations point decisively against petitioner's position.

Under petitioner's theory, a government official (including a President) could tell a White House or other agency attorney that he shredded subpoenaed documents or paid off a potential witness or erased a subpoenaed tape or concealed subpoenaed documents. An agency employee could tell an agency attorney that he had falsified his financial disclosure form or embezzled money from the agency. A prison guard might admit to a state agency attorney that he had beaten a prisoner. The possibilities are legion. Yet under petitioner's theory, such revelations of evidence of wrongdoing could be protected from disclosure to a federal grand jury.

It strains credulity to suggest that such results, in which attorneys who are *public* employees conceal information from the criminal process, are justified by a "*public* good." There is no escape from the unsettling consequence of petitioner's theory: Government agencies would be allowed to shield evidence of serious wrongdoing from the grand jury. As the court of appeals concluded, that result would flout "the strong public interest in honest government" and "would represent a gross misuse of public assets." Pet. App. 18a.[22]

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[22] As Judge Weinstein has stated: "If there is wrongdoing in government, it must be exposed. The law officer has a special obligation * * *. His duty to the people, the law, and his own conscience requires disclosure * * *." Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 Maine L. Rev. 155, 160 (1966).

Petitioner nonetheless cites policy concerns that, it says, justify the privilege, even in federal *criminal* proceedings.[23] Petitioner contends, for example, that government attorneys must be able to obtain facts to properly perform their functions—providing advice as to privileges, gathering and producing documents, making personnel decisions, rendering public statements, and the like. Pet. 3, 16. But the interest in *gathering* facts to perform those functions in no way requires the further step of *concealing* facts from a federal grand jury if the facts are (or become) relevant to a federal criminal investigation.

Petitioner responds, however, that there might otherwise be a chilling effect on government attorneys and employees. Pet. 14-16. This is familiar argument,[24] and this

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[23] Petitioner's argument that the attorney-client privilege must apply in the same absolute manner for corporations and government entities begs the true question whether there are relevant differences between private corporations and government entities for purposes of the privilege analysis. See Pet. App. 6a. It also fails to acknowledge that there already are many context-specific privileges recognized in federal and state law. Privileges often give way in the criminal context, in particular, in recognition of the paramount importance in criminal proceedings of obtaining relevant information. See *Nixon*, 418 U.S. at 708-713 & n.19; *Branzburg*, 408 U.S. at 688; *McCormick* § 104, at 388 (some States "deny the [physician] privilege in criminal cases generally, or in felony cases, or in cases of homicide").

[24] In *every* privilege case, the proponent argues that, in the absence of the privilege, important communications would be chilled—whether it be Presidential communications, information provided by reporters' sources, academic peer review discussions, state legislator discussions, or parent-child communications. In general, federal courts have concluded that they are ill-equipped to examine the relative merits of such claims. That is why courts generally look to background principles of judicial restraint and such objective criteria as the historical or contemporary support for a privilege. See *Branzburg*, 408 U.S. at 693-694 ("Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup.

Court has routinely rejected this kind of hypothesized effect as a basis for applying a privilege.[25] In addition, petitioner's chilling-effect contention—upon close examination—crumbles.

As has *always* been true, government employees and government lawyers understand that they do not control the ultimate assertion of privilege in any forum.[26] As a result, the government attorney and employee can have *no* expectation of confidentiality and *no* assurance that their communications or work product will remain confidential if called for in federal criminal proceedings. Moreover, as an historical matter, these common-law governmental "privileges" have rarely been asserted in federal grand jury proceedings, including in this investigation. Thus, government attorneys and employees necessarily know that their communications and work may be disclosed if relevant to a federal criminal investigation.[27]

Ct. Rev. 309, 361 (tracing "web of effects" from privileges is a "stupefying complex task").

[25] See *Nixon*, 418 U.S. at 712 ("We cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for" in criminal proceedings.); *Branzburg*, 408 U.S. at 693 (rejecting privilege although "argument that the flow of news will be diminished * * * is not irrational"); see also *University of Pennsylvania*, 493 U.S. at 193 (accepting that "confidentiality is important to proper functioning of the peer review process" but rejecting chilling effect as basis for privilege).

[26] The individual who is President at the time the information is sought ultimately controls the privilege. See *CFTC* v. *Weintraub*, 471 U.S. 343, 349 & n.5 (1985) (common-law privilege for entities belongs to current management, not former management).

[27] Two other facts further undercut petitioner's argument. First, the prospect of disclosure to a grand jury does not present the same kind of chilling effect as public disclosure. See *Branzburg*, 408 U.S. at 700. Second, the overwhelming majority of White House business, and federal agency work, never comes under grand jury scrutiny. See *Nixon*, 418 U.S. at 712; cf. *Branzburg*, 408 U.S. at 691.

To be sure, when government employees who are witnesses in a federal grand jury investigation choose to communicate with other

Relying on the corporate privilege, however, petitioner further suggests that, absent a privilege, government agencies might be discouraged from conducting internal fact-finding and legal work that they perform to "promote broader public interests in the observance of law." Pet. 22 (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)). But that argument ignores the fundamental distinction between private corporations and federal agencies. If there were no corporate privilege, corporations would be discouraged from conducting internal investigations because the facts developed could be subject to immediate disclosure to a federal grand jury, thereby exposing the corporation to criminal liability. That deterrent to gathering facts and performing legal work does not exist, however, in the governmental context. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States.[28] An agency cannot be adverse to the United States in a criminal prosecution.[29] When an agency becomes aware of internal wrong-

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government employees (including government attorneys) about facts under active criminal investigation, the possibility of compelled disclosure to the grand jury is necessarily higher. That raises the question, however, whether communications in those circumstances should be protected. The district court stated that "[t]he issues in this case have been complicated somewhat by the manner in which the White House Counsel's office has defined its area of responsibility." Pet. App. 75a n.7. A governmental privilege that allows White House or other agency attorneys to receive information from grand jury witnesses and communicate that information to other witnesses—with all of those communications concealed from the grand jury—is dubious at best as a policy matter. See *Branzburg*, 408 U.S. at 696-697 ("[I]t is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. * * * Such conduct deserves no encomium.").

[28] Petitioner suggests this conclusion would apply as well to an immunized witness, Pet. 17, but the analogy is inapt because an immunized witness can face criminal exposure for future crimes.

[29] See 4B Op. Off. Legal Counsel 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

doing, the agency's interest is to ferret it out, and there can be no risk of endangering a *governmental* interest by doing so and by disclosing the results to federal law enforcement authorities. Cf. 28 U.S.C. 535(b).

5. The final gambit of would-be privilege proponents is to conjure up some middle-ground privilege that can be overcome only upon an undefined showing of need or heightened relevance. So it is that petitioner now sets forth such an alternative, Pet. 26-27, an option it did not see fit to advance in the courts below.

Any such approach would render enforcement of a grand jury subpoena contingent on a judicial finding—based on a variety of factors—that the grand jury has demonstrated some specific reason for disclosure (beyond relevance) that outweighs the agency's interest in confidentiality. Such a test would require the balancing of intangibles—the grand jury's need for information and the agency's need for confidentiality—in the context of a particular investigation, generating endless rounds of time-consuming skirmishing. This Court has consistently rebuffed efforts to require this sort of showing.[30] In this

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[30] See, *e.g.*, *R. Enterprises*, 498 U.S. at 298 ("grand jury proceedings should be free of such delays" that proposed multifactor test would cause); *Branzburg*, 408 U.S. at 704-705 (under proposed heightened relevance standard, "courts would * * * be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid"); see also *University of Pennsylvania*, 493 U.S. at 194 (requiring "a specific reason for disclosure * * * beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way") (quotation omitted).

There also is no basis in *Nixon* for applying some heightened standard here. *Nixon* holds that even the *constitutional* Executive privilege for presidential communications yields in the face of the showing required to obtain evidence for criminal proceedings. See *United States* v. *Gillock*, 445 U.S. 360, 373 (1980) (Executive privilege does not "justify denying judicial power to secure all relevant evidence in a criminal proceeding"); *United States* v. *North*, 910 F.2d 843, 952 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part) (Court in *Nixon* "does not appear to have meant anything more than the showing that satisfied Rule 17(c)").

case as well, the argument warrants rejection. As the parties have heretofore agreed, governmental attorney-client and work product privileges either are available in federal grand jury proceedings, or are not.

6. Petitioner suggests that common-law privilege claims by federal agencies normally would be resolved internally within the Executive Branch. Pet. 20-21 n.6. But the law of privileges, we submit, can have a substantial effect even on the internal negotiation process within the Executive Branch. It is much more difficult, as a practical matter, for the President to order a Justice Department prosecutor to withdraw a grand jury subpoena (or not to seek certain documents) than it is for the White House to claim reliance on a purported common-law privilege to refuse production of information to the Department. The well-reasoned decision of the court of appeals, and the important principle it reaffirms, should have a positive impact on the ability of the Justice Department to obtain relevant information from the White House in a variety of criminal investigations.[31]

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[31] As has been reported in various congressional proceedings, the White House has interposed privilege claims against the Justice Department on several occasions in the last few years. For example, the White House refused to allow Justice Department attorneys to review documents from Vincent Foster's office in the days after his death. That prompted former Deputy Attorney General Heymann, as he has testified publicly, to tell the White House Counsel that he was making a "terrible mistake," and that "you misused us." S. Rep. No. 104-280, at 68, 83 (1996). See also *id.* at 75 (Justice Department's Office of Professional Responsibility referring to "yet another example of the lack of cooperation * * * we received from the White House throughout our inquiry" on Travel Office matter); H.R. Rep. No. 104-849, at 152 (1996) (quoting memo by the head of the Justice Department's Public Integrity Section regarding Travel Office criminal investigation: "[T]he White House's incomplete production greatly concerns us because the integrity of our review is entirely dependent upon securing all relevant documents."). The House Report on the Travel Office matter states that the Justice Department's Public Integrity Section issued a grand jury subpoena to the White House in 1994, and that the White House in response claimed privilege as to 120 documents. H.R. Rep. No. 104-849, at 151-153.

III

The attorney-client privilege and work product doctrine are complementary protections that serve the client's interest in obtaining effective legal services. They stem from the same common-law source. The attorney-client privilege applies to communications between attorney and client; the work product doctrine provides qualified protection as well to factual and legal work that the attorney performs in preparing the client's case.

For the reasons stated, a *government* entity, unlike a private corporation, cannot maintain the two attorney-based protections in federal criminal proceedings. That fundamental proposition ends the case: The conclusion applies to both the attorney-client and work product issues. See, *e.g.*, Pet. App. 51a n.4 (Kopf, J., dissenting) (same analysis governs threshold question of existence of governmental attorney-client and work product doctrines in federal criminal proceedings).

IV

Were the Court to grant the petition and ultimately agree with petitioner that a government entity can maintain attorney-client and work product protections in federal criminal proceedings, two additional questions would be presented: whether the requirements of the attorney-client privilege are met under the facts of this case; and whether the requirements of the work product doctrine are met under the facts of this case. Petitioner cannot satisfy the requirements of either privilege, however, as we will briefly explain. See Sup. Ct. R. 15.2.

1. Assuming *arguendo* that a government agency can maintain a governmental attorney-client privilege in federal criminal proceedings, petitioner's privilege claim nonetheless fails. This is so for several reasons. First, because Mrs. Clinton is not a government officer or employee, she is not a representative of the client under *Upjohn*. Cf. *Association of American Physicians and Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 911 (D.C. Cir. 1993) (First Lady, in official role as Chair of the Presi-

dent's Task Force on National Health Care Reform, was "officer or employee" for purposes of Federal Advisory Committee Act). Second, even if Mrs. Clinton is a government officer or employee, the privilege applies only to communications that "concerned matters within the scope of the employees' [governmental] duties." *Upjohn*, 449 U.S. at 394. The handling of the Rose Law Firm billing records and of documents from Mr. Foster's office did not involve governmental duties assigned to Mrs. Clinton.

Even if Mrs. Clinton is a client and the communications concerned matters within the scope of her official duties, the privilege claim still fails because the official meetings in question occurred in the presence of third parties—namely, Mrs. Clinton's personal attorneys. Although that fact would not defeat the privilege if Mrs. Clinton and the White House could satisfy the requirements of the so-called "common interest" exception to the no-third-party-presence requirement of the attorney-client privilege, they cannot do so here.

This Court has not considered whether there is a "common interest" exception to the traditional rule that attorney-client communications, to be privileged, must occur outside the presence of third parties. That is a highly important issue as to which the law is, in the main, underdeveloped. Courts have recognized the exception in two narrowly limited circumstances: (1) when two clients share the same attorney or (2) when two parties are co-defendants or co-plaintiffs in pending litigation. Neither situation exists here. Even if the Court assumed the common-interest exception applied to *anticipated* as well as pending litigation, see *Continental Oil Co.* v. *United States*, 330 F.2d 347, 350 (9th Cir. 1964), it would not be satisfied. At the meetings in question, the White House and Mrs. Clinton were not anticipating the possibility of future litigation in which they might be aligned as parties. The White House Office, as an agency, was not anticipating litigation at all. Moreover, a federal government agency does not possess an interest in common with an individual as *against* the United States in a

criminal investigation or prosecution. See 4B Op. Off. Legal Counsel 749, 751 (1980) ("This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.").

2. Assuming *arguendo* that a government agency can maintain a governmental work product privilege in federal grand jury proceedings, that claim also fails. The work product doctrine covers work performed by an attorney "in anticipation of litigation." The White House as an entity was not anticipating litigation. That ends the issue. Petitioner's primary response is that congressional proceedings are equivalent to litigation. Pet. 27-29. But that argument has no case law support and contradicts the plain meaning of the term "litigation." The work product doctrine is "grounded in the realities of litigation in our adversary system," *United States v. Nobles*, 422 U.S. 225, 238 (1975), and simply does not apply to "[m]aterials assembled in the ordinary course of business, or pursuant to *public* requirements unrelated to litigation, *or for other nonlitigation purposes*," Fed. R. Civ. P. 26 advisory committee's note (emphases added).

V

Finally, we note a procedural point: The current caption of this case is directly contrary to the independent counsel statute, see 28 U.S.C. 594(a), and to this Court's consistent practice.

The issue also plays itself out in the cauldron of trials. Opposing counsel at times prefer to label prosecutors as "the independent counsel" and to state or imply that the prosecutors do not represent the United States. In the 1996 trial of Jim Guy Tucker and the McDougals, Judge George Howard, Jr., put an end to gamesmanship of this sort in the presence of the jury during the examination of David L. Hale:

> Mr. Collins (Tucker's Attorney): If your Honor please, I said Independent Counsel; I didn't say the United States, and I believe—

> Mr. Jahn (Associate Independent Counsel): We are the United States, your Honor.
>
> Mr. Collins: They are not. * * * [T]hey are Independent Counsel appointed under a special act. * * *
>
> The Court: The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins. Go ahead.

United States v. *McDougal, Tucker, and McDougal,* No. LR-CR-95-173, Tr. 4525-4527 (E.D. Ark. Apr. 11, 1996).

The caption of this case, by referring to the "Office of Independent Counsel," directly contradicts Section 594(a) of Title 28. It is the law, not convention, which establishes that this Office, within its jurisdiction, possesses the full "authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [and] the Attorney General" and is responsible for "handling all aspects of any case, *in the name of the United States.*" 28 U.S.C. 594(a) (emphasis added).[32] In addition, "[w]hen issuing * * * subpoenas, an independent counsel stands in the place of the Attorney General." S. Rep. No. 100-123, at 22 (1987); see 28 U.S.C. 594(a). The statutory language is supported by the consistent practice of this Court for over two decades of identifying the "United States" as the party in cases involving special prosecutors and independent counsels.[33]

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[32] Under the statute, "the Attorney General or the Solicitor General" may "mak[e] a presentation as amicus curiae." 28 U.S.C. 597(b). But in such cases, the Independent Counsel still exercises authority, within his jurisdiction, "in the name of the United States." 28 U.S.C. 594(a)(9).

[33] See, *e.g.*, *Tucker* v. *United States*, 117 S. Ct. 76 (1996); *Marks* v. *United States*, 117 S. Ct. 76 (1996); *Haley* v. *United States*, 117 S. Ct. 76 (1996); *Fitzhugh* v. *United States*, 117 S. Ct. 256 (1996);

Neither the governing statute nor this Court's practice admits of an exception when the other party before the Court is a separate entity within the Executive Branch. As to that issue, moreover, there is controlling precedent: *United States* v. *Nixon*.[34]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. If the Court grants the petition, we respectfully request that oral argument be scheduled expeditiously so that delay in the orderly progress of this sensitive criminal investigation is minimized.

Respectfully submitted.

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United States v. *Poindexter*, 506 U.S. 1021 (1992); *North* v. *United States*, 500 U.S. 941 (1991); *United States* v. *Nofziger*, 493 U.S. 1003 (1989); *Poindexter, North, and Hakim* v. *United States*, 490 U.S. 1004 (1989); *Deaver* v. *United States*, 484 U.S. 829 (1987); *Mitchell and Haldeman* v. *United States*, 431 U.S. 933 (1977); *Ehrlichman* v. *United States*, 431 U.S. 933 (1977); *Barker* v. *United States*, 421 U.S. 1013 (1975); *United States* v. *Nixon*, 418 U.S. 683 (1974). In cases arising out of federal grand jury proceedings, moreover, the caption refers to federal government prosecutors as the "United States." See, *e.g.*, *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991). In *Morrison* v. *Olson*, 487 U.S. 654 (1988), the question presented was *whether* the independent counsel did, and constitutionally could, represent the United States in the criminal investigation. There is no such question here.

[34] There, as here, the President asserted a governmental privilege in refusing to comply with a subpoena duces tecum during criminal proceedings.

APPENDIX

STATUTE AND RULE INVOLVED

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

28 U.S.C. 535(b) provides:

> Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless—
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> > (1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or
> >
> > (2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.